APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

JAMES LOFTEN et al,

Appellants.

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Filed
May 5, 1982

Nos. 81-1386
et seq.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Paul Chin,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JAMES LOFTEN et al,

S 80 Cr. 729
(GLG)

Defendants.

ORAL OPINION OF DISTRICT COURT DENYING
MOTION TO SEVER OF PAUL CHIN

THE COURT: What you are really saying to me is if I grant your motion to sever it puts you in a position where the government would have to take the plea under the conditions you want. I don't think I can consider that as an acceptable reason for granting a severance.

With respect to the substantive charges, assuming they are all Pinkerton, I don't see how they can retroactively charge him with Pinkerton. In other words, I think they have got to prove that he was in the conspiracy at the time of the substantive offenses so that your spillover problem doesn't exist. To the extent that he is named in the substantive counts, they are going to have to prove that he was in the conspiracy at that time.

Consequently, I deny your motion to sever.

APPENDIX C—OPINION OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and eighty-two.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE IRVING R. KAUFMAN,
HONORABLE WALTER R. MANSFIELD,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES LOFTEN, ROY HARRIS, HENRY MORGAN, JR., PAUL CHIN, PATRICIA E. GAINER, FURMAN STARR, and ROBERT GOODWIN,

Defendants-Appellants.

81-1386, 81-1387, 81-1388, 81-1389, 81-1390, 81-1391, 81-1424, 81-1386-1391, 81-1424

FILED
MAR 8 1982
A. DANIEL FUSARO, CLERK

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments o[illegible]istrict Court be and hereby are affirmed.

1. Appellants contend that Judge Goettel improperly refused, after a full hearing, to suppress wiretap evidence. They claim, *inter alia,* that the wiretap application failed to establish probable cause to believe the evidence of narcotics violations would be uncovered through the wiretap. For example, they assert that the affidavit of Agent Joseph Corcoran accompanying the application inaccurately reported that after Todisco's arrest, appellant Loften placed telephone calls to twelve narcotics traffickers.

2. The Government conceded this error and asked Judge Goettel not to consider this portion of the affidavit in determining probable cause. Agent Sandler, who prepared the challenged list in a few hours from a list of 300 telephone numbers, was thoroughly questioned at the suppression hearing and was available for exhaustive cross-examination. At the close of testimony, the district court found that Sandler acted neither intentionally nor from an improper motive, but indicated he had not included this portion of the affidavit in his determination that probable cause existed. Indeed, had this list been considered, suppression would not have been warranted on

this basis because the inaccuracies were not the product of deliberate falsehood or reckless disregard for the truth. *See Franks v. Delaware,* 438 U.S. 154, 171-72 (1978). We do not, however, condone preparing an affidavit in the slipshod fashion exhibited in this instance.

3. The remainder of the affidavit was clearly sufficient to establish probable cause. Probable cause is a reasonable foundation for belief in a suspect's guilt; proof of guilt beyond a reasonable doubt is not required. *United States v. Webb,* 623 F.2d 758, 761 (2d Cir. 1980). Furthermore, affidavits in support of a search warrant must be read together. *See United States v. Harris,* 403 U.S. 573 (1971); *United States v. Ventresca,* 380 U.S. 102 (1965); *United States v. Kahan,* 572 F.2d 923 (2d Cir.), *cert. denied,* 439 U.S. 833 (1978).

4. Without the list of twelve narcotics traffickers, the affidavit and its supporting attachments established that: two witnesses, Reynolds and Brown, testified under oath during the prior Todisco trial describing their knowledge of Loften's involvement in large-scale narcotics trade between 1969 and 1976; Loften was reputed to be a major narcotics operator as shown by references to police files and his four arrests on drug charges, resulting in one conviction; a reliable informant reported that in 1980 Loften was trading in huge quantities of heroin; during August Loften and Todisco, one of Loften's heroin suppliers, had a series of thinly disguised telephone conversations about heroin transactions; Loften made approximately forty telephone calls a day to hundreds of different telephone numbers throughout the country. These facts surely demonstrated a "sufficiently suspicious set of overlapping facts" to establish probable cause that Loften engaged in narcotics operations. *United States v. Manafzadeh,* 592 F.2d 81, 90 (2d Cir. 1979). *See United States v. Perry,* 643 F.2d 38 (2d Cir.), *cert. denied,* 102 S.Ct. 138 (1981).

5. Appellants claim that the proof at trial established the existence of two separate conspiracies, one in operation from 1969-1975 and the other lasting from June through October 1980. Whether the proof has established single or multiple conspiracies is an issue of fact "singularly well-suited to resolution by the jury." *United States v. McGrath,* 613 F.2d 361, 367 (2d Cir. 1979), *cert. denied,* 446 U.S. 967 (1980). *See United States v. Alessi,* 638 F.2d 466, 472 (2d Cir. 1980). The evidence amply supports the jury's finding of a single narcotics conspiracy. There were massive cash purchases by Loften in the 1976-1978 period and in 1980 despite no discernible income. A telephone conversation was introduced in which Loften and co-appellant Morgan referred to difficulties in controlling the price of heroin over the last ten to fifteen years. Also, "stash pads" leased in 1976 and 1978 were still in use in 1980. Other bits and pieces showed the continuing nature of this conspiracy. The evidence suggests drug traffic continued over the years and did not cease in 1975 and then resume in 1980. Accordingly, the evidence supporting the jury's finding that the Government proved the existence of the conspiracy charged in Count One was ample. *See United States v. Murray,* 618 F.2d 892, 902 (2d Cir. 1980).

6. Appellants challenge the jury charge on multiple conspiracies. For example, they now contend that Judge Goettel failed to charge that the five-year statute of limitations applied. By not objecting to the absence of such an instruction at trial, however, appellants have waived their claim. *See United States v. Grammatikos,* 633 F.2d 1013 (2d Cir. 1980).

7. Loften claims that the district court should have instructed the jury, on the continuing criminal enterprise count, 21 U.S.C. §848, that a "series" of violations meant three or more. Loften, however, did not object to the charge at trial. We will not consider this belated claim on appeal. *See United States v. Grammatikos, supra.*

Moreover, courts need not define such common terms for the jury, *see United States v. Marino,* 639 F.2d 882 (2d Cir.), *cert. denied,* 102 S.Ct. 115 (1981), and the charge was substantially identical to the instructions approved by this Court in cases involving an alleged violation of a continuing criminal enterprise count. *See United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

8. Chin asserts that Judge Goettel abused his discretion in denying his motion for severance. While some of the evidence admitted at trial did not concern Chin directly, a co-conspirator's more limited role in the conspiracy doe snot alone justify a separate trial. *United States v. Aloi,* 511 F.2d 585 (2d Cir.), *cert. denied,* 423 U.S. 1015 (1975); *United States v. Vega,* 458 F.2d 1234 (2d Cir. 1972), *cert. denied,* 410 U.S. 982 (1973). Substantial evidence implicated Chin in the conspiracy. In addition to Loften's many conversations with Chin, Loften spoke to Morgan, Harris, Goodwin, and Gainer about Chin and the Hong Kong heroin transactions on numerous occasions. Moreover, Chin's acquittal on Count 8, charging unlawful possession of heroin, indicates that the jury was discerning and that he did not suffer "substantial prejudice" from the joint trial. *See United States v. Stirling,* 571 F.2d 708, 733 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978).

9. Morgan contends that the evidence at trial was insufficient to support his conviction because his conversations with Loften were "highly biased" misinterpretations and because Loften's statements to Morgan and other co-conspirators were "admitted without a prior independent showing of a conspiracy." Loften's statements constituted independent circumstantial proof of the existence of a conspiracy. They gave meaning to the "code" or cloaked language used among the co-conspirators and to the repeated trips Goodwin and Starr made to Detroit. They

established Morgan's own knowledge of Loften's activities. *See, e.g., United States v. Lubrano,* 529 F.2d 633 (2d Cir. 1975), *cert. denied,* 429 U.S. 818 (1976); *United Sttes v. Sisca,* 503 F.2d 1337 (2d Cir.), *cert. denied,* 419 U.S. 878 (1974). Thus, Loften's statements were properly admitted against Morgan as declarations of a co-conspirator. Federal Rules of Evidence, Rule 801(d)(2)(E); *United States v. Cambindo-Valencia,* 609 F.2d 603 (2d Cir. 1979), *cert. denied,* 446 U.S. 940 (1980).

10. Appellants raise a multitude of other claims in their briefs. Three illustrations will suffice. Appellants challenged Judge Goettel's denial of their motions to suppress the wiretap evidence because the tapes were allegedly not sealed "[i]mmediately" in accordance with the requirements of 18 U.S.C. §2518(8)(a). Judge Goettel properly refused to suppress the evidence. The delay was brief. *See United States v. McGrath,* 622 F.2d 36, 42-43 (2d Cir. 1980). Moreover, the delay was reasonable since the extremely large quantity of tapes made processing time-consuming. In addition, the tapes were stored in a DEA vault that could not be opened over the weekend. The Government also seeks to explain its delay by claiming that it was partially caused by the desire to have the tapes sealed by the same judge who issued the warrant. While we believe that the totality of the circumstances amounts to a reasonable explanation for the seven-day delay, *id.,* we wish to reiterate a point we made in *United States v. Vazquez,* 605 F.2d 1269, 1280 & n.25 (2d Cir.), *cert. denied,* 444 U.S. 981 (1979): the government is under a duty to have the tapes sealed promptly; it is under no duty whatsoever to have them sealed by the issuing judge.

11. Loften claims that the district court improperly ruled that his conversations with attorneys Socolov and Geller did not fall within the ambit of the attorney-client privilege. Loften did not meet his burden of establishing that the advice sought from Socolov and Geller concerned

legal matters rather than business investments. *See United States v. Demauro*, 581 F.2d 50, 55 n.4 (2d Cir. 1978). In addition, Loften waived any privilege of confidentiality by relating the conversations with Socolov and Geller to other persons, including Gainer and Harris. *See United States v. Stern*, 511 F.2d 1364, 367 (2d Cir.), *cert. denied*, 423 U.S. 829 (1975).

12. Starr contends that the district court abused its discretion in denying his motion pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(e)(1), for funds to purchase a copy of all the wiretap tapes. A full set of the tapes was available at the U.S. Attorney's office for defense counsel's use. Counsel for Loften and Gainer had a complete set of the tapes; the Government provided a free copy of every recording that Starr's counsel specifically requested. Accordingly, Judge Goettel did not abuse his discretion in denying Starr's request because it was not "reasonably necessary." *See United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980).

13. All appellants' other claims are equally without merit.

s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge.

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ Walter R. Mansfield
WALTER R. MANSFIELD,
Circuit Judges.